ATTORNEYS FOR APPELLANT:

STEVE CARTER
Attorney General of Indiana

CYNTHIA L. PLOUGHE
Deputy Attorney General
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

ELIZABETH GAMBOA
Franklin, Indiana

IN THE
COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A02-0608-CR-659
	)	
MICHAEL SHAW,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven J. Rubick, Commissioner
Cause No. 49G04-0510-CF-214459

January 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

The State appeals the trial court's order to suppress evidence in the trial of Michael Shaw. The State presents a single issue for our review, namely, whether the trial court abused its discretion in granting Shaw's motion to suppress.

We affirm.

FACTS AND PROCEDURAL HISTORY

On December 10, 2005, Indianapolis Police Officer Michael Horn stopped a vehicle for making a lane change without signaling. Raymond Gregory was the driver of the vehicle. While the vehicle was coming to a stop, Officer Horn observed the passenger, Shaw, "fumbling around on the left side of his body" while the vehicle was coming to a stop. Transcript at 6. Specifically, Officer Horn witnessed Shaw moving in a manner indicating that Shaw "had lifted up his jacket and was reaching over to the left side of his body." Id. at 7. However, after pulling over the vehicle, Officer Horn only requested the occupants' identification, which they provided.

While Officer Horn ran a license and warrant check in his cruiser, he again observed a similar series of movements by Shaw. After concluding that neither occupant of the vehicle had any outstanding warrants and their identifications proved to be valid, Officer Horn approached the passenger side of the vehicle. Officer Horn asked Shaw to exit the vehicle and stand in front of it. Officer Horn then conducted a search of the interior of the vehicle without permission from either Gregory or Shaw.

In his search, Officer Horn discovered a handgun wrapped in a stocking cap in front of Shaw's seat and a second handgun between the two front seats. Officer Horn

then asked Gregory to exit the vehicle, and Officer Horn arrested both Gregory and Shaw. On December 12, 2005, the State charged Shaw with Carrying a Handgun without a License, as a Class C felony. The State also charged Gregory with carrying a handgun without a license, but as a Class A misdemeanor.

At Shaw's suppression hearing, Officer Horn testified that there was no apparent criminal activity before he removed Shaw from the vehicle. Officer Horn also stated that Shaw's movements may simply have been Shaw adjusting his seatbelt. Further, Officer Horn testified that the handguns were not in plain sight. In granting both Shaw's and Gregory's motions to suppress, the trial court relied on Officer Horn's testimony. This appeal ensued.

DISCUSSION AND DECISION

A trial court is afforded broad discretion in ruling on the admissibility of evidence, and we will reverse such a ruling only upon a showing of an abuse of discretion. Clark v. State, 804 N.E.2d 196, 198 (Ind. Ct. App. 2004). When reviewing a trial court's ruling on a motion to suppress, the appellate court will examine the evidence most favorable to the ruling, together with any uncontradicted evidence. State v. Joe, 693 N.E.2d 573, 574-75 (Ind. Ct. App. 1998). That is, we will neither reweigh the evidence nor judge the credibility of witnesses. Clark, 804 N.E.2d at 198.

"[S]topping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth Amendment], even though the purpose of the stop is limited and the resulting detention quite brief." Delaware v. Prouse, 440 U.S. 648, 653 (1979). "Once the purpose of the traffic stop is completed, a motorist cannot be further detained

unless something that occurred during the stop caused the officer to have a reasonable and articulable suspicion that criminal activity was afoot." United States v. Hill, 195 F.3d 258, 264 (6th Cir. 1999). "If the . . . detention exceeds its proper investigative scope, the seized items must be excluded under the 'fruits of the poisonous tree doctrine.'" Id.

Whether a particular warrantless search and seizure violates the guarantees of the Fourth Amendment depends upon the facts and circumstances of each case. Joe, 693 N.E.2d at 575. The State bears the burden of proving that the warrantless seizure fell within an exception to the warrant requirement. Id. Where the trial court has found that the State has failed to meet this burden, the State appeals a negative judgment and will be reversed only where the uncontradicted evidence points unerringly to a conclusion opposite that reached by the trial court. Id.

The State contends that the trial court erred because it "ignored the evidence that this was not a search . . . based on reasonable suspicion that criminal activity was afoot. Rather, this was a search . . . to alleviate the officer's legitimate concern for his personal safety." Appellant's Brief at 4. Shaw responds that the State's argument is, in essence, a request that we reweigh the evidence that was before the trial court, which we will not do. We agree with Shaw.

The State's position on appeal centers on the uncontradicted evidence of Officer Horn's observations of Shaw's movements. Specifically, the State maintains that, because the evidence shows that Officer Horn properly stopped the vehicle and undisputedly witnessed movement by Shaw, Officer Horn had the authority to search the

vehicle for weapons. In support, the State cites Joe, in which we stated: "Once a vehicle has been properly stopped for investigative purposes, an officer may conduct a search of the automobile's interior for weapons without first obtaining a search warrant if the officer reasonably believes that he or others may be in danger." Joe, 693 N.E.2d at 575. In Joe, we held that the officers there did reasonably believe they were in danger when:

> the uncontradicted evidence reveals that the police officers were patrolling a neighborhood well known for drug trafficking and shootings. After stopping [defendant] Joe for the traffic violations [and while an officer was asking Joe for his license], Joe began fidgeting with his hand between the console and the driver's seat of the car. The police officer ordered Joe to put his hands where they could be seen. Joe did not immediately comply and complied only after the police officer made repeated demands and had drawn his gun.

Id.

The facts of the present situation are markedly different from those in Joe. Rather, the facts here are more analogous to our supreme court's recent decision in Quirk v. State, 842 N.E.2d 334, 341 (Ind. 2006). In Quirk, the court stated: "Because it is not at all unusual that a citizen may become nervous when confronted by law enforcement officials, other evidence that a person may be engaged in criminal activity must accompany nervousness before the nervousness will evoke suspicion necessary to support detention." Id.

Here, there is no evidence that Officer Horn was in a neighborhood well-known for drugs or shootings. Shaw and Gregory fully complied with all of Officer Horn's requests. Officer Horn himself testified that "there was no apparent criminal activity" and that "the suspicious movements may simply have been [Shaw] adjusting his seatbelt." Appellant's App. at 34. And, again, Officer Horn's license and warrant check

came back clean for both Gregory and Shaw. Hence, there is no "other evidence." Quirk, 842 N.E.2d at 341.

The State attempts to distinguish Quirk by alleging that that case does not apply to protective searches. But merely shifting in one's seat does not give rise to a concern for officer safety any more than it raises a reasonable suspicion. Thus, we conclude that Quirk is not entirely inapposite. The evidence does not "point[] unerringly to a conclusion opposite that reached by the trial court." Joe, 693 N.E.2d at 575. As such, we cannot say that the trial court abused its discretion in granting the motion to suppress.

Affirmed.

MAY, J., and MATHIAS, J., concur.